85-476 (1)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

DR. JACK J. BLANKFIELD, Petitioner

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent

ON WRIT OF CERTIORARI TO THE

TEXAS COURT OF APPEALS, FIRST SUPREME JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTION PRESENTED

Whether the carnival atmosphere fostered by a state agency during administrative hearings constitutes a denial of due process where hearings are characterized by disruption, noise, conversations between hearing officers and observers, where quorums are not maintained during the hearing, and where the hearing is conducted as a "side-show" to state conventions.

NO._____

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TEXAS COURT OF APPEALS,
FIRST SUPREME JUDICIAL DISTRICT

LIST OF ALL PARTIES

A complete list of all parties to this appeal is as follows:

1. DR. JACK J. BLANKFIELD, Petitioner; and
2. TEXAS STATE BOARD OF DENTAL EXAMINERS, Respondent.

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NO._____

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TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF APPEALS,
FIRST SUPREME JUDICIAL DISTRICT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Dr. Jack. J. Blankfield, the petitioner herein prays that a writ of certiorari issue to review two judgments of the Texas Court of Appeals, First Supreme Judicial District, which judgments were entered in the above-entitled case on February 14, 1985.

OPINIONS BELOW

This petition for certiorari combines two cases below which originated in administrative hearings conducted by the Texas State Board of Dental Examiners, Respondent, against Dr. Jack J. Blankfield, Petitioner. Both cases involved complaints against Petitioner and have been appealed in the Texas state courts as companion cases.

The judgments of the Texas Court of Appeals, First Supreme Judicial District are printed in the Appendix hereto infra, at pages A-1 and A-16. The judgments of the District Courts of Harris County, Texas, are printed in the Appendix hereto, infra, at pages A-12 and A-26.

JURISDICTION

The judgments of the Texas Court of Appeals, First Supreme Judicial District were entered on February 14, 1985. The Texas Supreme Court refused Petitioner's Applications for Writs of Error, and on June 19, 1985 denied Petitioner's Motion for Rehearing of the Applications for Writs of Error.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction hereof, as citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws. (Emphasis added.)

STATEMENT OF THE CASE

This petition is brought by Jack J. Blankfield, a dentist who seeks to avoid the suspension of his license to practice dentistry. The decision to suspend Petitioner's dental license resulted from two separate hearings conducted by the Texas State Board of Dental Examiners reviewing separate complaints by former patients of Petitioner.

The hearings were conducted with a blatant disregard for due process and the rudiments of fair play. These elements are indispensable if a party is to be provided a fair opportunity to participate in a hearing before an administrative agency. Customs and practices developed by the Texas State Board of Dental Examiners have relegated license suspension hearings to an exercise in frivolity that stands in shocking contrast to the seriousness of the interests at stake.

When dentists such as Petitioner are rightfully or wrongfully accused of malpractice, neglect or incompetence, these charges deserve careful and cautious consideration not merely to protect the interests of the State, but because unfounded charges carry reputation damaging potential and can result in the loss of a professional's livelihood.

Serious deficiencies were manifested during the hearings conducted concerning the complaints against Petitioner. One hearing was held at the San Antonio Convention Center, San Antonio, Texas and the other hearing was held at the Shamrock Hotel in Houston, Texas. As discussed below, each of these hearings was characterized by disruption, noise and conversations between hearing officers and observers. Further, the evidence shows that on many occasions a quorum of board members was not present at the hearing table. By decision of the Texas Board of Dental

Examiners, these hearings were conducted at the same time and place as dental conventions.

The hearings were apparently designed as the social hub of the convention with a variety of beverages available in the hearing room for all those conventioneers who desired to drop in and imbibe the beverages, chat with acquaintances, and enjoy the "action." Ironically, the hearing rooms were configured by Edgar Blood, the Board's Investigator, who has zealously pursued Petitioner's license suspension.

DUE PROCESS DEFICIENCIES DURING THE FEBRUARY, 1981 HEARING

The February, 1981 hearing was conducted at the Shamrock Hotel in Houston, Texas. At the beginning of the hearing, three members of the nine-member Board either were not present, or recused themselves from sitting in judgment.[1] (SF 37). This left only six members to decide the case. Although six members would

1. References are to testimony and exhibits in the trial court proceeding below.

constitute one more than what is needed for a quorum, a quorum was not present at the hearing table at all times during the taking of evidence and testimony. (SF 38). During the time while the proceedings were going on there were as few as three (3) BOARD members seated at the hearing table -- two less than that required for a quorum. (SF 42).

There was a carnival-like atmosphere prevailing in the hearing room (SF 36) with other distracting noises (SF 40); people getting up and getting drinks (SF 41); BOARD members greeting other people that came into the room -- together with there being a large number of people in the room and a general activity in the back of the room. (SF 40-41).

The general lack of attentiveness to the task at hand during this hearing proved to be the rule rather than the exception. No action was taken by the BOARD to correct the generally chaotic atmosphere prevailing at its hearings. The second hearing conducted by the

BOARD was patterned after the first in that an atmosphere of gaiety rather than solemnity was provided to Petitioner Blankfield as he made a good faith attempt to present the evidence that would have allowed him to retain his license to practice dentistry - his license to make a living.

DUE PROCESS DEFICIENCIES DURING THE APRIL, 1982 HEARING

To begin with, three members of the twelve member board either were not present or recused themselves from sitting in judgment. (PX-2). This left only nine members to decide the case. Although seven members would constitute one more than what is needed for a quorum, a quorum was not present at the hearing table at all times during the taking of evidence and testimony. (SF 35; 36; 38; 47; 55).

During the time while the proceedings were going on there were as few as four (4) board members seated at the hearing table -- three

less than that required for a quorum (SF 35; 36; 38; 47; 55).

Once again there was a "circus-like" atmosphere prevailing in the hearing room (SF 40) with other distracting noises and activities (SF 48; 54; 55); members of the board getting up to get a cup of coffee or to go talk to someone (SF 54-55); board members talking to other members of the dental association (SF 39) -- together with there being a large number of people in the room and the general activity in the back of the room to make the noise level appreciable. (SF 55).

The atmosphere in which the hearing was conducted was described by Petitioner Blankfield as follows:

> It was an atmosphere much like the old Roman gladiators, in a big room, and everybody who had to appear before the board was submitted to all of the conventioneers and the exhibitors and everyone that had any passive interests or simply to see what was going on at the State Dental Examiners' meeting.

(SF 21).

Jim Cowan, the attorney for Petitioner

Blankfield before the board hearing, testified at the trial of this cause that:

> By and large it would have been physically impossible for some of the members of the board to have heard all of the evidence that was presented in that room on that particular matter.

SF 56).

This was due to the high "noise level;" the conversations going on behind counsel table; and the levels and the movement of people distracting the board behind counsel table. (SF 55-56). It became so bad that at one point a Board member cried out:

> It's real hard to hear the witness, it's real hard to hear.

Moreover, counsel for Dr. Blankfield testified that the board gave "complete attendance" to the testimony of the complaining party, Ms. Mounce and then noted the following with regard to what happened after her testimony was finished:

> Shortly after Ms. Mounce finished her testimony, there bagan to be movement.
>
> There was always movement behind us.

There was always some conversation except at key moments as there sometimes is in a court room, but there were -- there were obviously motion behind us, people coming in and out of the room. I would see one of the members of the board nod over my shoulder, which I would assume would be just acknowledging the presence of somebody that they knew.

After Ms. Mounce's testimony, the members started some movement, and by movement I mean that they would get up from their seat, and they would move outside of my vision, because I was facing the balance of the board. The room behind me, I would say, was probably ten or eleven rows of folding chairs, I believe, set up in an audience type set up. There were a number of people back there, a number of people that were either other people appearing before the board, other witnesses, other dentists coming in. I don't know the character of all of them. I met several.

As the afternoon wore on, and particularly in the next morning, the tendency of the doctors and/or the non-dentists sitting on the board to get up and move, to go back and get a cup of coffee or talk, was greater. On one occasion I became a little bit concerned because, in fact, by my count there were only five people sitting at the table where the board was sitting, one of which was Dr. Brunson, and that is the -- that is the occasion in which I turned around, and one member of the board -- and I do not know who it was -- was standing at the back by the

coffee table chatting with somebody else. Where the others were, I did not know because my -- probably because of my own lack of expertise, I felt I'd better concentrate on what was going on in front of me and not what was going on in back.

Toward the latter part of the hearing the noise level was appreciable. There was appreciable conversation going on behind me. Some members of the board, when they were at the table, all appeared to be basically paying attention, but the levels and the movement of people was definitely distracting when it was in front of us, and when it was behind us, there seemed to be an addition.

I do know, and I do not know who it was, but in conversation with one of the board members, he indicated to me that at some stage of drinking coffee, he found it absolutely necessary to go to a restroom. Not an unusual circumstance, but nonetheless it at least was indicated to me in conversation.

By and large it would have been physically impossible for some of the members of the board to have heard all of the evidence that was presented in that room on that particular matter.

(SF 54-56) [Emphasis supplied].

Dr. Blankfield confirmed this observation by his counsel when he testified that:

There was rapt attention while the

> "injured" person was giving her testimony. No one appeared to leave the room. However, after the testimony was given by Ms. Mounce, then I believe there was a break, and we resumed again, and at that time when I was to give my testimony or answer questions, there seemed to be an immediate relaxation of everyone concerned, and the board members walked in, walked out, left the room.

(SF 33).

RESULTS OF THE FEBRUARY, 1981 AND APRIL, 1982 HEARINGS

The Board members surely enjoyed the dental conventions and probably their participation in these sham hearings, but when it was all said and done, it became apparent that this atmosphere of frivolity spawned serious consequences for Petitioner Blankfield.

Following the first hearing the Board issued its order suspending Petitioner Blankfield from the practice of dentistry for a period of one year. Following the second hearing the Board issued its order suspending Petitioner Blankfield from the practice of

dentistry for a period of two years, probating such suspension for all but the first ninety days thereof.

FEDERAL QUESTIONS RAISED BELOW

Petitioner Blankfield perfected appeals from these orders to the Texas trial courts having jurisdiction over these cases, i.e., the Harris County District Courts. The 80th and 125th Judicial District Courts of Harris County, Texas, reviewed the orders but were limited to review under the "substantial evidence rule" and the reception of any procedural irregularities not appearing of record.

Petitioner was not entitled to de novo review of the complaints filed against him. At the trial court level Petitioner raised all the deficiencies stated in this petition and asserted them as grounds for relief from the administrative orders, in as much as these deficiencies deprived Petitioner of due process.

The judgments of the trial courts upheld the Board's orders of suspension (Appendix A-1, A-16), Petitioner thereafter perfected appeals of these adverse judgments to the Texas Court of Appeals, First Supreme Judicial District, once again seeking relief on the due process grounds stated in this petition for certiorari. On February 14, 1985, said Texas Court of Appeals rendered judgment upholding and enforcing the orders of the Board. (Appendix A-12, A-26). The Texas Supreme Court refused Petitioner's Application for Writ of Error in each case and on June 19, 1985 refused Petitioner's Motion to Rehear Petitioner's Application for Writ of Error in the cases now before this Court.

Although both trial courts recognized something was askew with the manner in which the Board customarily conducts its hearings, neither court felt constrained to consider Petitioner's due process deprivations sufficient to remand Petitioner's cases for a

new hearing or reverse the decisions of the Board. The same results were obtained in the Texas appellate courts.

In summary no Texas state court felt compelled by Petitioner's due process arguments to enter a judgment which would cause the Texas State Board of Dental Examiners to change its customs to conduct hearings with the dignity, solemnity and procedure due persons situated as Petitioner. A person's livelihood should not be stripped in a carnival side-show. This petition provides Petitioner's only hope of obtaining the due process deprived him.

REASONS FOR GRANTING WRIT

A. This Court Could Ease Its Caseload And The Caseload of Every Court In The Land By Formulating Basic Guidelines To Insure The Provision Of Due Process In Administrative Hearings.

The issues presented in this petition provide the perfect vehicle for this Court to deal with the burgeoning caseload of this Court and every state and federal court with

jurisdiction to consider administrative appeals. Decisions of administrative agencies play an ever-increasing role in our society. More and more administrative agencies are being created or empowered to deal with problems where recourse would have rested in courts, if at all. Although the initial hearing of a great variety and number of matters are handled by bodies other than Courts, without exception the parties affected are allowed recourse to state or federal courts. The vast majority of these administrative bodies are staffed, controlled and directed by non-lawyers who are not fully cognizant of the importance of the provision of due process.

True, each type of board or agency must deal with differing circumstances, resources and procedures. However, specific standards of due process could be enunciated which would assure that these hearings were conducted in an atmosphere more conducive to a judicious

consideration of the evidence. When a hearing is conducted like an act in a three-ring circus, or when some other interference or impropriety is present, the damaged participant comes away with a feeling that the outcome was the result of these irregularities and not the result of a careful consideration of the evidence and merits of the matter. The obvious and common reaction is to appeal the outcome to the appropriate state or federal court. If an atmosphere of fairness prevailed, appeals from administrative agencies to the courts would be sharply reduced. Petitioner urges the Court to take this opportunity to enunciate these standards of fair play, especially in cases like this one where de novo review is not allowed.

B. Due Process Requires That A Hearing Be A Real One And Not A Sham Or Pretense.

In the eyes of the law there is no hearing unless a fair opportunity is afforded the parties to prove their case before an administrative agency. Lewis v. Metropolitan

Savings and Loan Association, 550 S.W.2d 11 (Texas Supreme Court 1977). Even if there is evidence in an administrative record that can be considered "substantial evidence," a party may yet have been denied due process and the rudiments of fair play in the conduct of the administrative hearing that produced the record upon which the agency acted. Lewis, id. The record in this case shows a multitude of distractions to and interferences with the presentation of evidence and the hearing examiners reception and attentiveness to the evidence presented.

The requirements of due process are not satisfied by a hearing which is typified as a sham or pretense rather than a real hearing. Joint Anti Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164, 71 S.Ct. 624, 644, 95 L.Ed 817 Ciechon v. City of Chicago, 686 F2d 511 (7th Cir. 1982) The record here contains many factors which indicate that the hearings were not conducted as a genuine good

faith attempt by the Board to hear and consider both sides of the complaints against Petitioner, Dr. Blankfield. Instead, the Board seemed to approach the hearings with a festive manner, as men after sport. The conduct of the Board hardly rises to the level of solemnity due process would require when a person's livelihood is at stake. It is a fundamental requisite of due process that the hearing must be conducted in a reasonable manner. Goldberg v. Kelly, 397 U.S. 254, 268, 90 S.Ct. 1011, 1020 (1970). At the very least, Petitioner Blankfield was and is entitled to have an opportunity to be heard and to defend, enforce and protect his rights before an administrative body in an orderly proceeding.

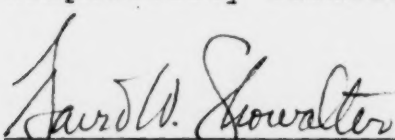
Gibraltar Mausoleum Corp. v. City of Cincinnati 439 N.E.2d 922 (Ohio Ct.App. 1981). The record clearly reflects he was deprived of this basic right. It would be of immeasurable benefit to the parties in this case, and

parties to administrative proceedings generally, to have specific guidelines from this Court insuring the protection of these basic due process rights.

The Court should reverse the orders of the Texas State Board of Dental Examiners, or at least order that another hearing be conducted under conditions which will assure that Petitioner's due process rights are honored.

WHEREFORE, Petitioner respectfully prays that this petition for a Writ of Certiorari be granted and that such Writ issue to the Texas Court of Appeals, First Supreme Judicial District.

Respectfully submitted,



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APPENDIX

APPENDIX

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Court of Appeals
First Supreme Judicial District

OPINION

DR. JACK J. BLANKFIELD, APPELANT

NO. Ø1-84-Ø596-CV V.

TEXAS STATE BOARD OF DENTAL EXAMINERS, APPELLEE

On Appeal from the 8Øth District Court of Harris County, Texas Trial Court Cause No. 81-25838

The Texas State Board of Dental Examiners suspended Dr. Blankfield's dental license for a period of one year. On appeal to the district court, the administrative order was upheld. We affirm the district court's order.

The Texas State Board of Dental Examiners conducted a two-day administrative hearing in February 1981, as a result of complaints made to the board by four former patients of Dr. Blankfield. The hearing was held at the Shamrock Hotel in Houston during a dentists' convention, where six of the board's nine members heard the charges against Dr. Blankfield. At the conclusion of the hearing,

the board found Dr. Blankfield guilty of dishonorable conduct, malpractice, or gross incompetency in the practice of dentistry; of failing to use proper diligence in his practice; of negligence in performing dental services, which injured or damaged a patient; and of failing to conduct his practice on the highest plane of honesty, integrity, and fair dealing.

Dr. Blankfield appealed the administrative order to the 80th District Court of Harris County. After a non-jury trial, the presiding judge took the case under advisement, but then he died before rendering a decision. A mistrial was declared, and a second trial was conducted before the court on April 23, 1984. Dr. Blankfield appeals from the judgment entered by the court after that trial, affirming the administrative order.

In his first two points of error, Dr. Blankfield contends that the trial court erred in entering judgment against him and in not granting his motion for a new trial, because he

was denied due process of law in the manner in which the Texas Board of Dental Examiners conducted his administrative hearing. Under these points, he argues that a quorum of the nine member board was not present at the hearing table at all times during the presentation of evidence and that the noise and activities going on in the hearing room were distracting and created a "carnival-like" atmosphere.

Dr. Blankfield testified that several members of the board left the hearing table at various times, but because his back was toward the audience area, he could not say whether any board member actually left the room during the hearing. The asisstant attorney general who prosecuted the case before the board testified that a quorum was present at all times during the presentation of evidence and that she was not aware of any loud noises or disturbances that interferred with the flow of testimony. She testified that frequent recesses and coffee breaks were taken, because it was anticipated

that the hearing would be long. If the proceedings became difficult to hear, the chair admonished the audience or called a recess.

In determining whether due process was afforded Dr. Blankfield, we must look for the presence or absence of fair play and substantial justice. State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984). Although the proceedings of an administrative agency are not required to meet the strict procedural standards of judicial proceedings, certain minimum requirementes of due process of law must be met. Thompson v. Texas State Board of Medical Examiners, 570 S.W.2d 123, 130 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.).

The evidence on this question is conflicting. However, there is evidence that would support the conclusion that a quorum of the board members was present throughout the administrative hearing and that they heard all of the evidence presented. We accordingly hold that the record does not establish the absence

of fair play and substantial justice, requiring a reversal of the trial court's judgment.

In an opinion issued in a related case, Blankfield v. Texas State Board of Medical Examiners, No. Ø1-84-Ø671-CV, dated February 14, 1985, we concluded, as we have here, that the record did not establish an absence of fair play and substantial justice that would require a reversal of the trial court's judgment. However, we expressed our concern about the general atmosphere in which the administrative hearing was conducted. We repeat that admonition here.

In his third point of error, Dr. Blankfield contends that the trial court erred in affirming the suspension order, because there was no record to review for substantial evidence in support of the board's order.

The record on appeal reflects that the original record of the administrative hearing was introduced as an exhibit at the first trial of the case. Thus, the record itself shows that

the board transmitted the administrative hearing record to the district court as required by Section 19(d)(1) of the Texas Administrative Procedure Act. At the close of evidence in the instant trial, the court questioned counsel about the administrative hearing record, and Dr. Blankfield's counsel responded as follows:

> COUNSEL: Your Honor, at the previous trial, the record was introduced as an exhibit by Mr. Gauss. And I would hope it is still in the courthouse somewhere. But it's a three-volume statement of facts. If the Court does not have it I would suggest Mr. Gauss provide them with another copy. Because I made record reference to each one of these instances.

Thereafter, the court and both attorneys discussed various portions of the administrative record, using the board's copy, and at the conclusion of those discussions, the board's counsel stated that he was willing to leave his copy with the court for further review. Counsel for Dr. Blankfield replied that he did not object to that procedure, but that he would like to know what happened to the original. The

court then stated that, with counsel's permission, it would keep the copy in custody until the clerk determined whether the original document was available. Dr. Blankfield's attorney then asked the court to review "the entire record from the administrative agency . . which is somewhere I hope in the courthouse." The court responded that it intended to do that and that it would try to rule promptly.

Dr. Blankfield's counsel never asked the court to continue the hearing or to reopen the case, so that the original record could be located and introduced into evidence. Indeed, he indicated his agreement to the court's review of the copy furnished by the board's counsel, and he asked only that the court review the entire record before entering its decision. There is no showing that the court did not review the entire record as requested. When it became apparent that the record introduced at the first trial was lost, it was incumbent upon the appellant to introduce into evidence a copy

of that record for purposes of this appeal. Although the appellant is aware that the lost record has not been found, he has not filed a motion to abate this appeal or a motion to supplement the record with a copy of the lost record.

It was Dr. Blankfield's burden to bring the administrative record forward in the instant proceeding, and having failed to do so, he cannot complain now of the absence of such record. We overrule this point of error.

The judgment of the trial court is affirmed.

/s/ FRANK G. EVANS
FRANK G. EVANS
Chief Justice

Associate Justices Cohen and Dunn also sitting.
No publication.

JUDGMENT RENDERED AND OPINION DELIVERED FEBRUARY 14, 1985.

TRUE COPY ATTEST;

/S/ KATHRYN COX
KATHRYN COX
CLERK OF THE COURT

IN THE SUPREME COURT OF TEXAS

No. C-4044 May 22, 1985

DR. JACK J. BLANKFIELD)
) From Harris County,
vs.)
TEXAS STATE BOARD OF) First District
DENTAL EXAMINERS)

Application of petitioner for writ of error to the Court of Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Dr. Jack J. Blankfield, pay all costs incurred on this application.

No. C-4044 June 19, 1985

DR. JACK J. BLANKFIELD)
) From Harris County,
vs.)
) First District.
TEXAS STATE BOARD OF)
DENTAL EXAMINERS)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 19th day of June, 1985.

MARY M. WAKEFIELD, Clerk

By /s/Courtland Crocker, Deputy
Courtland Crocker

No. 81-25838

DR. JACK J. BLANKFIELD	$	IN THE DISTRICT COURT
	$	
VS.	$	OF HARRIS COUNTY,
	$	TEXAS
TEXAS STATE BOARD OF DENTAL EXAMINERS	$	
	$	80TH JUDICIAL
	$	DISTRICT

JUDGMENT

Be it remembered that on the 23rd day of April, 1984 came on to be heard the above-styled and numbered cause.

The Plaintiff, Dr. Jack J. Blankfield, appeared personally and by his counsel, Joe K. Longley and the Defendant, Texas State Board of Dental Examiners appeared through assistant Attorney General Robert W. Gauss. Both parties having announced to proceed; the Court did proceed to try this cause as a review of the administrative orders of the Texas State Board of Dental Examiners dated February 21, 1981, docketed as Complaint No. 1980-13. Said order of the Texas State Board of Dental Examiners suspended Texas Dental License No. 4788 issued by the Texas State Board of Dental Examiners to

Jack J. Blankfield, D.D.S. for a period of one year beginning June 1, 1981.

The Court finds that a temporary injunction was issued on the 28th day of May, 1981, which temporary injunction enjoined the Texas State Board of Dental Examiners from enforcing its findings and order in docketed Complaint No. 1980-13 pending the final resolution of the Plaintiff's suit filed in this cause.

The Court having considered the pleadings, the evidence, the arguments of counsel, and having reviewed the record of the proceedings of the administrative hearing held on February 19, 1981, which proceedings resulted in the aforementioned Board Order, is of the opinion that the following judgment should be rendered.

It is therefore ORDERED, ADJUDGED, and DECREED that the Board Order in Complaint 1980-13 is affirmed.

It is further ORDERED that the Order of the Board shall become effective on the date that this Judgment becomes final for appeal purposes;

in the event of an appeal to the Court of Appeals and/or Application for Writ of Error to the Supreme Court, this Judgment shall become effective thirty datys after the final disposition of such appeal and/or Application for Writ of Error affirming this Judgment.

It is further ORDERED, ADJUDGED, and DECREED that all costs are assessed against the Plaintiff, Jack J. Blankfield.

SIGNED this 26th day of June, 1984

/s/ Weldon H. Berry
JUDGE PRESIDING

APPROVED AS TO FORM:

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(512) 477-4444

BY: /s/ Joe K. Longley
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Bar No. 12542000
ATTORNEY FOR PLAINTIFF

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BY: /s/ Robert W. Gauss
Robert W. Gauss
Assistant Attorney General
Bar No. 07769000
ATTORNEY FOR DEFENDANT,
Texas State Board of
Dental Examiners

Court of Appeals
First Supreme Judicial District

OPINION

DR. JACK J. BLANKFIELD, APPELLANT

NO. Ø1-84-Ø671-CV V.

TEXAS STATE BOARD OF DENTAL EXAMINERS, APPELLEE

On Appeal from the 125th District Court of Harris County, Texas
Trial Court Cause No. 82-41205

Dr. Blankfield appeals from an administrative order, issued by the Texas State Board of Dental Examiners, directing that his dental license be suspended for two years, but probating all but the first 90 days of the suspension. The district court upheld the order, and we affirm the judgment of the district court.

The administrative proceeding was conducted to hear a complaint to the board by a former patient of Dr. Blankfield. According to the patient's complaint, she paid $6,980 for dental implant surgery and permanent bridges on both sides of her lower mouth. Nine months after she

had fully paid for the permanent bridges, the patient had not yet received them, and she had to return to Dr. Blankfield's office numerous times for repair or replacement of the temporary bridges that he had installed. The patient finally consulted another dentist, who found gum infection around the left implant, which had become completely detached from the bone. Further examination revealed that a permanent bridge could not have been installed on the right implant, because it had sunk too far during the long delay following the implant surgery. The patient alleged that she had to spend $11,215 for corrective treatment on her mouth.

On April 30, 1982, the board held a hearing on the complaint against Dr. Blankfield at the San Antonio Convention Center during a state dental convention. Nine of the board's 12 members heard the charges against Dr. Blankfield. After the testimony of the patient and the response of Dr. Blankfield, the board

found Dr. Blankfield guilty of dishonorable conduct, malpractice, or gross incompetency in the practice of dentistry or dental hygiene; of failing to use proper diligence in conducting his practice or of failing to prevent avoidable infections to the patient; and of negligently performing dental services that injured the patient.

In two points of error, Dr. Blankfield contends that he was denied due process of law because of procedural irregularities during the administrative hearing. He contends that these procedural irregularities require reversal of the board's order based upon constitutional grounds as well as upon the provisions of the Texas Administrative Procedures Act.

Section 19(e) of the Texas Administrative Procedure Act requires the reversal of an administrative order if the findings or decisions violate constitutional provisions or are made upon unlawful procedure, resulting in

prejudice to substantial rights. Tex. Rev. Civ. Stat. Ann. art. 6252-13a, sec. 19(e)(1),(3) (Vernon Supp. 1984). Though the proceedings of an administrative agency are not required to meet the strict procedural standards of judicial proceedings, the hearing must meet certain minimum requirements of due process of law. Thompson v. Texas State Board of Medical Examiners, 570 S.W.2d 123, 130 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). In determining whether due process was afforded, the reviewing court will look for the presence or absence of fair play and substantial justice. State v. Crank, 666 S.W.2d 91, 94 (Tex. 1984).

Dr. Blankfield points out that only nine members of the board were present to decide his case. He asserts that while the proceedings were going on, there were sometimes as few as four board members seated at the hearing table and that a "circus like" atmosphere prevailed in the hearing room. As representative of the quality of the proceeding, he points to the

testimony of the counsel who represented him at the hearing:

> Shortly after Mrs. Mounce finished her testimony, there began to be movement. There was always movement behind us. There was always some conversation except at key moments as there sometimes is in a courtroom, but there were -- there were [sic] obviously motion behind us, people coming in and out of the room. I would see one of the members of the board nod over my shoulder, which I would assume would be just acknowledging the presence of somebody that they knew.
>
> After Mrs. Mounce's testimony, the members started some movement, and by movement I mean that they would get up from their seat [sic], and they would move outside of my vision, because I was facing the balance of the Board. The room behind me, I would say, was probably ten or eleven rows of folding chairs, I believe, set up in an audience type setup. There were a number of people back there, a number of people that were either other people appearing before the Board, other witness, other dentists coming in. I don't know the character of all of them. I met several.
>
> As the afternoon wore on, and particularly in the next morning, the tendency of the doctors and/or the non-dentists sitting on the Board to get up and move, to go back and get a cup of coffe or to talk, was greater. On one occasion, I became a little bit concerned because, in fact, by my count

there were only five people sitting at the table where the Board was sitting, one of which was Dr. Brunson, and that is the -- that is the occasion in which I turned around, and one member of the Board -- and I do not know who it was -- was standing at the back by the coffee table chatting with somebody else. Where the others were, I did not know because my -- probably because of my own lack of expertise, I felt I'd better concentrate on what was going on in front of me and not what was going on in back.

Toward the latter part of the hearing the noise level was appreciable. There was appreciable conversation going on behind me. Some members of the Board, when they were at the table, all appeared to be basically paying attention, but the levels and the movement of people was definitely distracting when it was in front of us, and when it was behind us, there seemed to be an addition.

I do know, and I do not know who it was, but in conversation with one of the Board members, he indicated to me that at some stage of drinking coffee, he found it absolutely necessary to go to a restroom. Not an unusual circumstance, but nonetheless it at least was indicated to me in conversation.

By and large it would have been physically impossible for some of the members of the Board to have heard all of the evidence that was presented in that room on that particular matter.

Dr. Blankfield also refers to his own testimony, summarizing his version of the hearing:

> There was rapt attention while the "injured" person was giving her testimony. No one appeared to leave the room. However, after the testimony was given by Mrs. Mounce, then I believe there was a break, and we resumed again, and at that time when I was to give my testimony or answer questions, there seemed to be an immediate relaxation of everyone concerned, and the Board members walked in, walked out, left the room.

While this testimony tends to show that several members of the board left the hearing table at various times, the evidence on the record does not conclusively establish that any board members actually left the room during the hearing. The evidence also indicates that the hearing room was equipped with microphones and that loudspeakers had been set up in the back of the room near the coffee table. Thus, the trial court could reasonably have concluded from all of the evidence that a quorum of the board members was present throughout the

administrative hearing and that it heard all of the evidence presented.

Although we do not condone the general atmosphere in which the administrative hearing was conducted, we hold that the record does not demonstrate the absence of fair play and substantial justice, requiring a reversal of the trial court's judgment.

The judgment of the trial court is affirmed.

/s/ FRANK G. EVANS
FRANK G. EVANS
Chief Justice

Associate Justices Cohen and Dunn also sitting.

No publication.

JUDGMENT RENDERED AND OPINION DELIVERED FEBRUARY 14, 1985.

TRUE COPY ATTEST;

/s/ Kathryn Cox
KATHRYN COX
CLERK OF THE COURT

IN THE SUPREME COURT OF TEXAS

No. C-4045 May 8, 1985

DR. JACK J. BLANKFIELD)
) From Harris County,
vs.)
TEXAS STATE BOARD OF) First District
DENTAL EXAMINERS)

Application of petitioner for writ of error to the Court of Appals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Dr. Jack J. Blankfield, pay all costs incurred on this application.

No. C-4045 June 19, 1985

DR. JACK J. BLANKFIELD)
) From Harris County,
vs.)
) First District.
TEXAS STATE BOARD OF)
DENTAL EXAMINERS)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 19th day of June, 1985.

MARY M. WAKEFIELD, Clerk

By /s/ Courtland Crocker, Deputy
COURTLAND CROCKER

No. 82-41205

DR. JACK J. BLANKFIELD	$	IN THE DISTRICT COURT
	$	
VS.	$	OF HARRIS COUNTY,
	$	TEXAS
TEXAS STATE BOARD OF DENTAL EXAMINERS	$	
	$	125TH JUDICIAL
	$	DISTRICT

JUDGMENT

Be it remembered that on the 21st day of March, 1984 came on to be heard the above-styled and numbered cause.

The plaintiff, Dr. Jack J. Blankfield, appeared personally and by his counsel, Joe K. Longley and the Defendant, Texas State Board of Dental Examiners appeared through Assistant Attorney General Robert W. Gauss. Both parties having announded to proceed, the Courd did proceed to try this cause as a review of the administrative Orders of the Texas State Board of Dental Examiners dated June 23, 1982, docketed as Complaint No. 1981-21. Said Order of the Texas State Board of Dental Examiners suspended Texas Dental License No. 4788 issued

by the Texas State Board of Dental Examiners to Jack J. Blankfield, D.D.S. for a period of two years; all but ninety days thereof being probated.

The Court finds that a supersedas bond was issued, which supersedas bond stayed the Texas State Board of Dental Examiners from enforcing its findings and Order in docketed Complaint No. 1981-21, pending the final resolution of the Plaintiff's suit filed in this cause.

The Court having considered the pleadings, the evidence, the arguments of counsel, and having reviewed the record of the proceedings of the administrative hearing held on April 30, 1982, which proceedings resulted in the aforementioned Board Order, is of the opinion that the following judgment should be rendered.

It is therefore ORDERED, ADJUDGED, and DECREED that the Board Order in Complaint 1981-21 is affirmed.

It is further ORDERED that the stay effected by the supersedas bond will remain in full force and effect until this cause is finally

determined on its merits in the District Court, the Court of Appeals, or the Supreme Court. If the final judgment affirms the Order of the Texas State Board of Dental Examiners, the ninety day period of complete shutdown of the dental office of Dr. Blankfield shall commence thirty days after the judgment affirming the Board Order becomes final.

It is further ORDERED, ADJUDGED, and DECREED that all costs are assessed against the Plaintiff, Jack J. Blankfield.

SIGNED this 17th day of July, 1984.

/s/ Michael L. O'/Brien
JUDGE PRESIDING

APPROVED AS TO FORM:

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Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-476

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1985

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DR. JACK J. BLANKFIELD,

Petitioner

VS.

TEXAS STATE BOARD OF DENTAL EXAMINERS,

Respondent

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE STATE COURTS ERR IN HOLDING THAT PETITIONER FAILED TO ESTABLISH A DENIAL OF DUE PROCESS?

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NO. 85-476

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1985

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DR. JACK J. BLANKFIELD,

Petitioner

VS.

TEXAS STATE BOARD OF DENTAL EXAMINERS,

Respondent

* * * * * * * * * *

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Texas State Board of Dental Examiners, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari.

STATEMENT

The "Petition for Writ of Certiorari" is actually two petitions for Writs of Certiorari growing out of two separate administrative hearings, two separate district court reviews, and two separate appellate reviews. Although the parties are identical in both cases, the administrative hearings were held over one year apart and involved entirely different fact situations and resulted in two separate and distinct sanctions. The hearings were open to the public in accordance with The Texas Open Meetings Law.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The State Courts properly held that Petitioner failed to establish a deprivation of Due Process.

ARGUMENT

Petitioner's arguments in support of certiorari suffer from one fatal flaw: they assume facts which are not supported by the record.

Under the Administrative Procedure and Texas Register Act, administrative decisions are subject to judicial review under the substantial evidence rule; however, the reviewing court is authorized to take testimony concerning alleged procedural errors which do not appear of record. In both these cases such procedural errors were alleged and testimony was received and considered by the reviewing court. Petitioner, a highly interested witness, testified, and his testimony was refuted. The reviewing court held that Petitioner failed to establish deprivation of due process, which holdings were affirmed by the Court of Appeals; writ of error was refused by The Supreme Court of Texas, no reversible error.

The Petition for Writ of Certiorari is fatally flawed because he assumes, as facts, in his "Question Presented" that quorums were not maintained and that the hearings were conducted as side-shows to state conventions. Allegations are not facts and saying that something is so does not make it so. These allegations and the testimony in support thereof were before the reviewing court as was the refuting testimony.

Petitioner's "Reasons For Granting Writ" are likewise flawed. Basic guidelines have been formulated to provide Due Process in administrative hearings. The cases cited by Petitioner, in his petition, articulate these guidelines; the courts below have held that the record, including the testimony adduced before the reviewing court, fails to establish that he comes within such guidelines.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DAVID R. RICHARDS
Executive Assistant
Attorney General

J. PATRICK WISEMAN
Chief, State and County Affairs

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregong instrument has been served by depositing same in the United States mail, certified, return receipt requested addressed to: David W. Showalter, 5959 West Loop South, Suite 424, Bellaire, Texas 77401 on this 10 day of October, 1985.

ROBERT W. GAUSS